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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 529

NICHOLAS GUARRACINO,

Petitioner,

—against—

LUCKENBACH STEAMSHIP COMPANY, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Petitioner presents this case in an entirely false light; the QUESTION PRESENTED is not what he says it is.

Petitioner tells this Court that he was caused to fall

> "• • • through respondent's failure to have a reasonably safe means of exit from the hatch where petitioner was performing his work aboard the vessel" (Petition, p. 2).

But the District Court's Findings were precisely to the contrary and the Court of Appeals affirmed that "These factual findings were soundly based on competent evidence" (Petition, p. 10).

The District Court found that

> "• • • a passageway to the forward interior ladder was available for use at the time of the accident • • •"

and that

> "* * * the longshoremen in D-deck, including the libellants, could have used this interior ladder to leave the hatch when the whistle blew, if they so desired, without moving any cargo" (Petitioner's appendix below, Vol. I, p. 39a).

In addition, the District Court found that an available portable ladder was being procured; that petitioner and his co-libellant had been instructed by their hatch boss to wait in the hold until the ladder arrived; that the men were paid for working until 5 P.M. but that the stevedore foreman blew the whistle between 4:45 and 4:50 P.M., and that

> "* * * libellants, without waiting for the portable ladder they requested and which they had been told was on its way, and in defiance of their hatch boss' order to 'hold tight', immediately tried to leave D-deck by climbing on a pallet of cargo about 5 feet high. It was while standing atop this cargo and attempting to climb upon C-deck that the accident occurred" (Petitioner's appendix below, Vol. I, p. 38a).

Petitioner withdrew his negligence claim during the trial and the District Court found on the proofs submitted by both parties that defendant's vessel was seaworthy. The District Court's ultimate finding of fact was as follows:

> "I find that the proximate cause of libellants' accident was their failure to make use of the available interior forward ladder or to wait a reasonable time for the production of the portable ladder which they requested and which they were informed was being obtained. Instead of doing either, as soon as the whistle blew and in defiance of the hatch boss' order to 'hold tight', they attempted to climb out of the hatch by manner of their

own choosing. Luckenbach cannot be held liable nor can its vessel be found unseaworthy" (Petitioner's appendix below, Vol. I, p. 39a).

The Court of Appeals said:

"A fixed ladder in a vertical shaftway at the forward end of the hatch opening was accessible at the time. Libellant and a fellow longshoreman, rather than wait for the portable ladder or walk a short distance to the fixed ladder, climbed a stack of cartons. Guarracino succeeded in getting one leg over the edge of the hatch opening when he slipped and fell * * *" (Petition, pp. 9-10).

The Court of Appeals continued:

"These factual findings were soundly based on competent evidence before the Court and plainly justify the findings that the ship was neither unseaworthy nor negligent" (Petition, p. 10).

On the *facts* of this case, as distinguished from petitioner's *assertions*, there is no conflict with *Ferrante* v. *Swedish American Lines*, 3 Cir., 331 F. 2d 571,* or *Thompson* v. *Calmar Steamship Corporation*, 3 Cir., 331 F. 2d 657, or with *Gutierrez* v. *Waterman*, 373 U. S. 206. In its opinion in this case, the Court of Appeals itself distinguished *Ferrante* and *Thompson* saying:

"The case is readily distinguishable from the recent decisions of the Third Circuit, brought to our attention by

[1] Ferrante v. Swedish American Lines, 331 F. 2d 571 (3 Cir. 1964); Thompson v. Calmar Steamship Corp., 331 F. 2d 657 (3 Cir. 1964)" (Petition, p. 10).

* The petition for certiorari, No. 275, Oct. Term 1964, has been withdrawn.

libellant's counsel after oral argument, that espouse the view that the longshoreman's negligent use of the ship's equipment to create an unsafe condition may make the ship unseaworthy. Here the accident was caused by the longshoreman's negligence in failing to use the ship's seaworthy equipment. Of course, this negligence would not be an absolute bar to recovery if the ship had been negligent or unseaworthy, but it cannot by itself convert a seaworthy ship into an unseaworthy one or a non-negligent shipowner into a negligent one. No unsafe condition was created, for the cartons were never intended to serve as a ladder."

In *Thompson*, there was a factual finding of unseaworthiness where ship's equipment was negligently used as a battering ram in shifting various shoreside freight cars with resulting injury to a longshoreman on the dock.

Gutierrez is as far afield as the South Pole is from the North. There the longshoreman was injured when he slipped on loose beans strewn on the dock which had spilled from their bags during the unloading of the vessel. This Court sustained the District Court's findings that these bags were defective and unseaworthy, stating:

"* * * cargo containers must be reasonably fit for the purpose for which they are to be used. * * * A ship that leaks is unseaworthy; so is a cargo container that leaks. * * * Beans belong inside their containers. * * * These bean bags were unfit and thus unseaworthy" (pp. 213-214).

But the District Court, in the present case, made factual findings on competent evidence, and the Circuit Court agreed, that petitioner had a reasonably safe means of leaving the hold, there was no defective condition, and the vessel was seaworthy.

It is quite apparent that this case is not at all in conflict with either *Thompson* or *Gutierrez*, much less are the "facts identical" (Petition, p. 3).

Nor is there any conflict within the Second Circuit. In *Grillea* v. *United States*, 232 F. 2d 919, Judge Hand upheld a damage award to a longshoreman caused by a misplaced and defective hatchboard, but recognized that

> "* * * each case must turn on its particular circumstances" (p. 922)

and illustrated by referring to *Berti* v. *Compagnie*, 2 Cir., 213 F. 2d 397, where a strongback was dislodged by a winchman, and *Manhat* v. *United States*, 2 Cir., 220 F. 2d 143, cert. denied 349 U. S. 966, where a boat was dropped from its davits by a carelessly turned lever; recovery was denied in both of these instances. And, similarly, the Second Circuit has found *Grillea* inapplicable and denied recovery in other longshoremen cases without "enunciating a radical principle of law" (Petition, p. 5). *Hooper* v. *Terminal Steamship Company*, 296 F. 2d 281, cert. denied 369 U. S. 843; *Paddu* v. *Royal Netherlands Steamship Company*, 303 F. 2d 752, cert. denied, 371 U. S. 840; *Spinelli* v. *Isthmian Steamship Company*, 326 F. 2d 870, cert. denied 377 U. S. 935, petition for rehearing denied, 377 U. S. 1010, motion for 2nd rehearing denied, —— U. S. ——, 32 L. W. 3132, October 13, 1964.

This case is of no intrinsic or general importance; its outcome will affect only these litigants and will be of no consequence to others.

This Court's attention is not merited and the petition should be denied.

Respectfully submitted,

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